(14,951.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 354.

LEWIS P. KELSEY AND JAMES K. GILLESPIE, APPELLANTS,

vs.

W. J. CROWTHER, J. T. LYNCH, AND WILLIAM GLASMANN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 22, 1895.

Said purchaser to have after this date thirty (30) days for the examination of the title of said premises, and in case said title is adversely reported on by the attorneys of said purchasers then said part consideration hereby receipted, shall be at once returned to said purchasers; but if said title is approved I hereby contract and agree to and with said Kelsey and Gillespie, that I will, at once on payment of said balance of the agreed purchase-money, to wit: $2,700.00 duly execute, sign and acknowledge and deliver a full and perfect warranty deed, conveying to said purchasers the entire title to said premises, and I agree to at once furnish an abstract of title to said premises, and other needful papers.

WM. J. CROWTHER. [SEAL.]"

Plaintiffs on their information and belief allege that defendant Crowther will tender to plaintiffs, if the decree herein is in their favor, his deed without his wife's release of dower therein for the alleged reason that defendant Crowther's said wife is unwilling to release her dower right in said premises.

That said wife before, at, and after the time of said Crowther entering into said unwritten agreement and the continuation thereof, the aforesaid written agreement, expressed herself as satisfied therewith and her willingness to have the said forty acres sold, and consented thereto, and in pursuance thereof only signed the deed to said ten acres with her said husband and released her dower right therein; and plaintiffs on their information and belief allege that said wife is now only unwilling to release her dower right as aforesaid to said thirty acres because so advised, persuaded, and induced by her husband, the said defendant Crowther.

That said Crowther did not furnish to plaintiffs an abstract of title to said premises, as stipulated in the foregoing agreement, so that plaintiffs could not examine the title to said premises within thirty days.

That on the 14th day of October, 1887, notwithstanding said abstract had not been furnished to plaintiffs as agreed, plaintiffs tendered $2,700.00, as per said agreement, to the defendant Crowther and demanded a proper conveyance of said property, but defendant Crowther then and there refused to do the same and has not executed such conveyance.

That plaintiffs are ready and willing to pay said balance of the purchase price of said property to the defendant Crowther.

And the plaintiffs on their information and belief allege that the said defendants, John T. Lynch and William Glassman, severally claim to have acquired some estate or interest in the said thirty acres of land herein described from the said defendant, Crowther; but the plaintiffs allege that the estate or interest so claimed, if any, is subsequent, subject, and subordinate to the said contract hereinbefore set out in favor of the plaintiffs, and that all such interest and estate, if any, received or acquired by either the said Lynch or the said Glassman was so received and acquired with full knowledge and information by each of them of the prior existence of the said contract and the rights of the plaintiffs thereunder, and was

also received and acquired without any consideration. Wherefore plaintiffs demand judgment—

First. That the defendant W. J. Crowther execute to plaintiffs a good and sufficient warranty deed, free of all liens, to said described parcel of land, including the release of his said wife's dower.

Second. On failure to secure said release of dower, then that indemnity or compensation of $1,500.00 be decreed to plaintiffs to protect them against said wife's inchoate right of dower.

Third. That the defendants Lynch and Glassman be required to set forth the nature of their respective claims to said land; that same be decreed to be subject and subordinate to plaintiffs' rights therein and wholly invalid, and that they and each of them be perpetually enjoined from asserting any claims whatever in or to said premises or any part thereof adverse to the plaintiffs, and for such further relief as may be proper, including their costs herein.

P. L. WILLIAMS,
W. VAN COTT,
Att'ys for Plaintiffs.

(Verified as provided by law.)

Endorsed: (Title of court and cause.) Received copy hereof December 12th, 1888. Arthur Brown, att'y for W. J. Crowther. Filed December 13th, 1888. Henry G. McMillan, clerk.

Demurrer.

(Title of Court and Cause.)

Come now the defendants and demur to the second amended complaint herein, and for cause of demurrer allege that the same does not state facts sufficient to constitute a cause of action.

ARTHUR BROWN,
Attorney for Defendants.

Order Overruling Demurrer.

(Title of Court and Cause.)

The demurrer heretofore filed by defendants to the second amended complaint came up regularly to be heard, and, having been argued and duly considered, the same is now overruled; to which ruling the defendants duly excepted.

Answer to Second Amended Complaint.

(Title of Court and Cause.)

The defendants jointly answer the second amended complaint, and defendant Crowther of his own knowledge and defendants Lynch and Glassman on information and belief deny that on the 12th day of September, 1887, or at any other time the plaintiff- and

defendant Crowther entered into an unwritten agreement whereby plaintiffs agreed to buy and defendant Crowther agreed to sell 40 acres of land, or any other quantity of land, for the sum of $3,250.00 or any other sum.

Defendants in like manner deny that ten acres of said purchase was to be conveyed at once, and that $500, as a part of or out of the $3,250.00, was to be paid on so conveying.

Deny that the other thirty acres should be conveyed for the balance of the $3,250 when or in the manner set forth in the agreement annexed to the complaint; deny that the amounts specified in the agreement annexed to the complaint were any part or balance of the $3,250.

And defendants deny in manner aforesaid that there was any connection between the contract set forth in the complaint and the sale of an undescribed ten acres to others for $500.

And deny in like manner that the transaction mentioned in the complaint was connected with any other agreement or sale or contract or conveyance whatsoever.

Deny that the said ten acres was not worth $500 or that plaintiffs would not have paid that sum therefor unless they also obtained the title to the 30 acres for $2,750.

Deny that said $500 was a material or valuable or any consideration for the purchase price of said 30 acres, and deny that the defendants or either of them knew or agreed that it was any part of the consideration or had any connection therewith.

And defendants, further answering, deny that on the 13th day of September, 1887, or at any other time the plaintiffs and defendant Crowther reduced the unwritten contract set forth in the complaint to writing, or that the writing set forth was executed in pursuance of said unwritten agreement alleged in the complaint.

Defendants deny, as first above, that the wife of defendant Crowther at the time of entering into said agreement or at any other time expressed herself as satisfied therewith or expressed her willingness to convey said 40 acres or consented thereto, or that her signature to the deed for ten acres was in pursuance of a consent or willingness to sell the same, and deny that the unwillingness of the wife of Crowther to release dower is because she is advised or induced or persuaded by the defendant Crowther or either of the defendants.

Defendants further deny that said Crowther had to furnish said plaintiffs an abstract of title to said land, as stipulated in the agreement, and that Crowther was to furnish an abstract within thirty days, or so that plaintiffs could examine the title within that time, or for the purpose of enabling them to examine the title at all; but defendant Crowther was the owner of an old abstract of title not in his possession at the time of said writing, and it was agreed between the plaintiffs and defendant Crowther that if plaintiffs elected to purchase under the option in said written contract defendant would deliver his title deeds and other papers pertaining to said land. Defendant Crowther promised to deliver with said title deeds said abstract if he could obtain possession of the same; but it was ex-

pressly understood that plaintiffs were to examine the title in other and independent ways than the abstract therein mentioned.

Defendants further deny, as above stated, that plaintiffs tendered defendants $2,750, or any other sum, on October 14th, 1887, or at any other time. Deny that plaintiffs or either of them made any tender on that day or expressed themselves as ready or willing to comply with said option or to pay the purchase price therefor; but, on the contrary, plaintiffs on said 14th day of October, 1887, requested defendant Crowther to make a new contract for the sale of said property on other and different terms.

Defendants deny, as above stated, that the plaintiffs or either of them made or kept good any tender of the price, or that they were ready or willing to pay the balance of the purchase-money or ever have been.

Defendants, further answering, as aforesaid, allege that the said written contract was drawn up by one of the plaintiffs. It was hurriedly read to defendant Crowther, and defendant Crowther did not see it and did not understand the language relative to the abstract; that it was expressly agreed between the parties that if plaintiffs desired any other or different abstract than the one which the defendant owned but did not have in his possession, they should procure it themselves and at their own expense. It was understood as doubtful that defendant Crowther could get the possession of that abstract, and if he could not plaintiffs were to examine the title at their own expense.

Defendants further allege that the defendant Crowther never agreed upon the purchase or sale of said premises. The plaintiffs were to have the option to buy for thirty days and no longer; that plaintiffs or either of them during the 30 days ever signified in any manner their election to take the said land, and only manifested their willingness to buy said land on the 14th day of October.

And defendants Lynch and Glassman and Crowther, jointly answering the new allegations contained in the last amended complaint, allege that a day or two prior to the 4th day of November, 1887, the said defendant, Crowther, made a written contract to sell or gave a written option to buy, for a valuable consideration to said defendants, Lynch and Glassman, the said premises described in the complaint.

That on the morning of the 4th day of November, 1887, the said defendants, Lynch and Glassman, then a copartnership doing business as real-estate agents under the aforesaid name of Lynch and Glassman, accepted the said option, and the said Crowther executed to them a contract to sell, in writing, *of* the said premises and received thereon $100.00 in money; that the said defendants, Lynch and Glassman, caused the same to be at once recorded in the office of the recorder of deeds of Salt Lake county, where said premises are situated; that there was then on the records no contract or *lis pendens* or other documents signifying or intimating that the said plaintiffs had or claimed to have the slightest interest whatsoever in said premises.

And said defendants, Lynch and Glassman, of their own knowl-

edge and said Crowther on information and belief allege that at the time of making said purchase the said Lynch or Glassman had no knowledge or notice of any contract in favor of the said plaintiffs or either of them or of any rights or equities of the said plaintiffs or either of them in or to said premises or any part thereof.

And said Lynch and Glassman allege that the contract set forth in the amended complaint, for which recovery is sought, to wit, between plaintiffs and Crowther, was never heard of by them until the filing of the amended complaint in this case, long after said Lynch and Glassman had completed the purchase of said premises and paid the entire consideration money therefor.

That since the execution of the said contract in writing, on the 4th day of November, 1887, and prior to the filing of the first amended complaint herein, said Lynch and Glassman had completed the said arrangement for the purchase, paid the said Crowther, as they were bound to do under the contract of purchase, and taken the legal title to said premises.

And said defendants allege that said Lynch and Glassman are *bona fide* purchasers of the said land for valuable consideration, without notice of the claims of said plaintiffs or of their rights, if they have any.

And the said defendants deny—said Lynch and Glassman of their own knowledge and Crowther upon information and belief—that the estate or interest of the said Lynch and Glassman is subsequent or subject or subordinate to said contract or contracts set forth in the complaint in favor of the plaintiffs, and deny that said interest or estate was received or acquired with full or any knowledge or information by either Lynch or Glassman of the existence of the contract set forth in the complaint or of the rights of the plaintiffs under either of them, and deny that the said estate or interest was received or acquired without consideration, but allege the same was for a full, adequate, and sufficient consideration.

ARTHUR BROWN,
Att'y for Def'ts.

(Verified as provided by law.)

Endorsed: (Title of court and cause.) Copy served on us this 13th day of December, 1888. P. L. Williams, W. Van Cott, att'ys for plaintiffs. Filed December 13th, 1888. Henry G. McMillan.

Findings of Fact and Conclusions of Law.

(Title of Court and Cause.)

Said cause came on to be heard the 20th day of December, 1888, before said court, P. L. Williams and W. Van Cott appearing for the plaintiffs and Arthur Brown for the defendants.

Witnesses were sworn to support the issues between the said parties respectively, and, after argument thereof by the respective counsel, the court doth find the issues for the defendants.

First.

That the written contract set forth in the complaint was executed by the defendant W. J. Crowther and delivered to the defendants.

Second.

That at no time during the thirty days therein specified did the said plaintiffs tender or offer to pay the said defendants the $2,700.00, purchase price of the said land; that at no time during the said period did the said plaintiffs signify their intention to accept the terms of said contract and to purchase the said land.

Third.

That on the 14th day of October, 1887, plaintiffs and defendant Crowther had further conversation on the subject of this purchase, but that on that day the plaintiffs or either of them did not tender $2,700 or any part thereof or any other sum, as per said agreement, for the said ground to defendant Crowther, and the said plaintiffs were not ready or willing to pay the balance of the purchase-money for the said property to the defendants.

Conclusion of Law.

Wherefore, upon the findings aforesaid, the court finds that the defendant is entitled to judgment for costs against the plaintiffs.

ELLIOT SANFORD,
Judge 3rd Dist. Court.

Endorsed: (Title of court and cause.) Filed January 30th, 1889. W. J. Clarke, clerk, by Geo. H. Mason, deputy clerk.

Decree.

(Title of Court and Cause.)

Said cause coming on to be heard, counsel for the respective parties having introduced evidence and argued the said cause and the court having filed its findings of fact, said court doth hereby adjudge, order, and decree that the complaint in this cause be dismissed, and that the defendants recover of the said plaintiffs their costs, to be taxed.

ELLIOT SANFORD, *Judge.*

Endorsed: (Title of court and cause.) Filed Jan'y 30th, 1889. William J. Clarke, clerk, by Geo. H. Mason, deputy clerk.

Evidence.

LEWIS P. KELSEY, *of* behalf of plaintiffs, testified:

I know William J. Crowther, and he and the plaintiffs on September 13, 1887, entered into the following agreement:

SALT LAKE CITY, UTAH, *September 13th*, 1887.

Received of Lewis P. Kelsey and J. K. Gillespie, the sum of fifty dollars, being part consideration of the purchase price to wit: $2,750.00 at which the undersigned agrees and contracts to sell, and by good and sufficient warranty deed convey, free of all liens, to said Kelsey & Gillespie, the following-described lot of ground, to wit; The east thirty (30) acres of the south half of the southwest quarter of section three (3), township one (1) south of range one (1), west of Salt Lake meridian.

Said purchaser to have after this date thirty (30) days for the examination of the title of said premises, and in case said title is adversely reported on by the attorneys of said purchasers, then said part consideration, hereby receipted, shall be at once returned to said purchasers; and if said title is approved, I hereby contract and agree to and with said Kelsey & Gillespie, that I will at once on the payment of said balance of agreed purchase-money, to wit; $2,700.00, duly execute, sign and acknowledge and deliver a full and perfect warranty deed, conveying to said purchasers the entire title to the said premises, and I agree to at once furnish an abstract of title to said premises, and other needful papers.

WM. J. CROWTHER. [SEAL.]

In the original agreement the underscored parts were written and the remainder printed.

William J. Crowther did not tender or furnish an abstract of title to said premises at any time.

No part of the purchase price was tendered to William J. Crowther within the thirty days mentioned in the above contract, and on the 31st day William J. Crowther refused to convey to us. I demanded an abstract from William J. Crowther within the thirty days, and he said the recorder wanted to charge him twelve dollars for a copy of the abstract he had obtained some time before and he would not pay it. I told him his contract called for an abstract and I wanted it.

We never had any agreement with Mr. Crowther about an abstract except as contained in the written agreement.

Plaintiffs rest.

WILLIAM J. CROWTHER, on behalf of defendants, testified:

I did not agree to furnish the plaintiffs an abstract of title, but only agreed to pay four dollars on one when the plaintiffs obtained it. I told the plaintiffs I would see what a copy of the abstract could be obtained for. I found out and told them and went to the recorder's office for no other purpose. I had previously obtained an abstract to these premises, and some other parties had it, and I could not obtain it, and I told the plaintiffs that if I could get that abstract they should have it; if I could not, then I would pay $4.00 on one when they obtained it. It was this abstract that I agreed to furnish to plaintiffs.

The plaintiffs in error specify and assign the following errors and grounds for reversal of the judgment and decree of the supreme court of Utah Territory herein:

d. The said supreme court erred in affirming the action of the said district court in failing to find whether the appellee Crowther tendered an abstract, as specified in said contract, to the appellants.

e. Said supreme court erred in sustaining the action of said district court in giving judgment for the appellees when it was not found by the said district court whether the said abstract of title had been tendered to the appellants.

h. The said supreme court erred in sustaining the action of the said district court in giving judgment for the appellees when the said court did not find that an abstract and deed had been tendered by the appellee Crowther to the appellants.

j. The said supreme court erred in affirming the decree of said district court in favor of the said appellees and against the said appellants.

The above and foregoing is agreed to by the counsel for plaintiffs in error and defendants in error as the record of proceedings in all the courts of Utah to be printed herein on the hearing of this appeal, and the clerk of the Supreme Court of the United States is hereby requested to print the same, together with such additional matter as required by the rules and practice of the Supreme Court of the United States.

Dated March 27th, 1895.

PARLEY L. WILLIAMS,
ORLANDO W. POWERS,
Attorneys for Plaintiffs in Error.
ARTHUR BROWN,
Attorney for Defendants in Error.

[Endorsed:] Case No. 14,951. Supreme Court U. S., October term, 1894. Term No., 354. Lewis P. Kelsey *et al.*, app'ts, *vs.* J. Crowther *et al.* Stipulation in regard to printing record. Filed Apr. 9, 1895.

In the Supreme Court in and for the Territory of Utah, January Term, 1891.

LEWIS P. KELSEY *et al.*, Appellants,
vs.
W. J. CROWTHER *et al.*, Respondents.

MONDAY, *January 26th.*

This cause, coming on regularly to be heard, was argued by Waldemar Van Cott and O. W. Powers for appellants, by Arthur Brown in reply, was submitted and taken under advisement.

June Term, 1891.

LEWIS P. KELSEY *et al.*, Appellants,
vs.
W. J. CROWTHER *et al.*, Respondents.

SATURDAY, *September* 12*th.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

Thereupon counsel for appellants pray the allowance of an appeal to the Supreme Court of the United States, and, the same being objected to by counsel for respondents, leave was granted appellants to file affidavits of value of matter in dispute, and the matter to be heard at the next session of the court; meantime remittitur to be stayed.

June Term, 1891.

LEWIS P. KELSEY *et al.*, Appellants,
vs.
W. J. CROWTHER *et al.*, Respondents.

SATURDAY, *October* 3*rd.*

Appellants, by their counsel, having heretofore prayed the allowance of an appeal to the Supreme Court of the United States, and this being the day set for hearing of the same, affidavits of value being this day filed, it was ordered that such appeal as prayed be, and is hereby, allowed, and the bond to be given thereon is hereby fixed at $500.

TERRITORY OF UTAH:

In the Supreme Court.

LEWIS P. KELSEY and J. K. GILLESPIE, Plaintiffs & Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Defendants and Respondents.

Opinion by Blackburn, Judge.

This is a suit in equity to enforce the specific performance of the following contract:

SALT LAKE, UTAH, *September* 13, 1887.

Received of Lewis P. Kelsey and J. K Gillespie, the sum of fifty dollars, being part consideration of the purchase price to wit $2,750.00 at which the undersigned agrees and contracts to sell and by good and sufficient warranty deed convey free of all liens to said Kelsey & Gillespie the following-described lot of ground, to wit: The east thirty (30) acres of the south half of the southwest quarter of section three (3) township one (1) south of range one (1) west of

Salt Lake meridian. Said purchaser to have after this date thirty (30) days for the examination of the title of said premises and in case said title is adversely reported on by the attorneys of the said purchasers, then the said part consideration hereby receipted shall be at once returned to said purchasers, but if said title is approved, I hereby contract and agree to and with said Kelsey & Gillespie that I will at once on the payment of said balance of agreed purchase-money, to wit, $2,700.00 duly execute, sign and acknowledge a full and perfect warranty deed conveying to said purchasers the entire title to said premises and I agree to at once furnish an abstract of title to said premises and other needful papers.

The complaint alleges a tender of the money, although an abstract was not furnished; a demand for a deed and the failure to make the same.

The answer is a specific denial of the allegations of the complaint. A trial was had by the court, a findings of fact, and a judgment that the complaint be dismissed, from which judgment the plaintiffs appeal.

The testimony is all in the record, and we do not deem it important to review the findings of fact made by the trial court. The claim of the appellants is that the evidence does not justify the judgment. It shows that the contract was signed and delivered on the 13th day of September, 1887; that the defendant- failed altogether to furnish an abstract; that no time within the thirty days did the plaintiff- offer to pay the purchase-money and demand a deed, but on the 31st day—October 14th, 1887—defendant Crowther went to the office of plaintiffs and told Kelsey, one of the plaintiffs, that he did not come around yesterday, and that his time was up, and Kelsey said that he had forgot it, and Crowther further told him he had forfeited his fifty dollars, but he further said—but this Kelsey denies—he offered him back the fifty dollars. This occurred on the street in front of the office of plaintiffs, Crowther being in his buggy with his wife, and Kelsey went immediately into his office and brought a bag with money in it, and said, Here is your money; but Crowther drove off and refused to wait. Kelsey says the amount of money required was in the bag. Kelsey further says that the offer of the money was on the condition that Crowther's wife would also sign the deed.

We think this judgment must be affirmed.

1st. The contract is an option. The plaintiffs had thirty days in which to tender the money and demand a deed. By the terms of the contract they did not have thirty-one days, and, having failed in that time to tender the money, they lost their right to enforce the contract; nor do we think the failure of the defendant to furnish an abstract extended the time; it might make him liable for damages, but not enlarge or change the terms of the contract.

2nd. It does not appear from the evidence in this case that the plaintiffs have not a full and complete remedy at law for all the damages they may have suffered by reason of any and all breaches of this contract, if any were committed, by the defendant Crowther,

and as a rule specific performance of contracts *are* not enforced in equity where the parties injured by breach of contract can be completely compensated in a suit at law.

3rd. The plaintiff Kelsey says that he offered the money on the condition that the wife of the defendant Crowther would sign the deed.

A husband cannot contract away his wife's right of dower.

A court of equity has no power on the husband's contract to compel a wife to relinquish her dower rights. Therefore the offer of the money was upon a condition that could not be complied with, and that was not obligatory upon the defendant, and that a court of equity could not enforce, and was no offer at all.

3, Pomeroy Equity, sec. 1400 *et seq.*

We see no reason for the reversal of this judgment. It is therefore affirmed.

We concur.

C. S. ZANE, *C. J.*
JAMES A. MINER, *J.*

[Endorsed:] Supreme court of Utah. Lewis P. Kelsey *et al. vs.* W. J. Crowther *et al.* Opinion. Marked —. Filed Sept. 12, 1891. Jos. P. Bache.

By the Honorable Charles S. Zane, chief justice of Utah, to W. J. Crowther, J. T. Lynch, and William Glasmann, and to Arthur Brown, their attorneys, Greeting:

Whereas Lewis P. Kelsey and James K. Gillespie have lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of Utah Territory in favor of you, the said W. J. Crowther, J. T. Lynch, and William Glasmann, and have filed the security required:

You are therefore hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, D. C., within sixty (60) — from the date of this citation, to do and receive what may pertain to justice to be done in the premises.

Seal Supreme Court Territory of Utah, United States of America.

Given under my hand, at the City of Salt Lake, in the Territory of Utah, this 9th day of November, A. D. 1891.

C. S. ZANE,
Chief Justice of Utah Territory.

Attest:
JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Due service of a copy of the above citation admitted this 12th day of November, A. D. 1891.

ARTHUR BROWN,
Attorney for Appellees.

[Endorsed:] Supreme Court United States. Lewis P. Kelsey *et al.*, app'l'ts, *vs.* W. J. Crowther *et al.*, appellees. Citation. Original. Filed in the supreme court Nov. 12, 1891, at Salt Lake City, Utah. Jos. P. Bache, clerk.

Know all men by these presents that we, H. W. Lawrence and John J. Daly, residing in the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto William J. Crowther, J. T. Lynch, and William Glasmann, appellees, in the sum of five hundred dollars, to be paid to the said William J. Crowther, J. T. Lynch, and William Glasmann, their executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirty-first day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at Salt Lake City, in said Utah Territory, in the supreme court of said Territory, in a suit depending therein between Lewis P. Kelsey and James K. Gillespie, appellants, and the said appellees, judgment and decree was rendered against the said appellants, and the said appellants having taken an appeal to the Supreme Court of the United States to reverse the said judgment and decree, and a citation, directed to the appellees, having been issued and served, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., within sixty days from the date of said citation:

Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make their appeal and plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) H. W. LAWRENCE. [SEAL.]
" JOHN J. DALY. [SEAL.]

Sealed and delivered in the presence of—

JULIUS GAUER.

Approved by—

C. S. ZANE, *C. J.*

Endorsed: Title court & cause. Bond. Filed Nov. 3rd, 1891. Jos. P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } ss:

R. S. Hamilton, being first duly sworn, *each for himself* says that he resides in Salt Lake City, Utah Territory, and has resided there for 4 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 3 years; that he is well acquainted with the east thirty acres of the south half of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some — prior hereto has been the sum of $9,000.00.

(Signed) R. S. HAMILTON.

Subscribed and sworn to before me this 26th day of September, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } ss:

F. M. Bishop, being first duly sworn, *each for himself* says that he re*re*sides in Salt Lake City, Utah Territory, and has resided there for 19 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 3 years.

That he is well acquainted with the east thirty acres of the south half of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some — prior hereto has been the sum of $9,000.00.

(Signed) F. M. BISHOP.

Subscribed and sworn to before me this 26th day of September, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } *ss:*

J. A. Heiss, being first duly sworn, *each for himself* says that he resides in Salt Lake City, Utah Territory, and has resided there for 21 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 3 years.

That he is well acquainted with the east thirty acres of the south-west quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some time prior hereto has been the sum of $7,500.00.

(Signed) J. A. HEISS.

Subscribed and sworn to before me September 26th, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } *ss:*

John J. Corum, being first duly sworn, *each for himself* says that he resides in Salt Lake City, Utah Territory, and has resided there for 3 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 3 years.

That he is well acquainted with the east thirty acres of the south half of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some — prior hereto has been the sum of $7,500.00.

(Signed) JOHN J. CORUM.

Subscribed and sworn to before me this 24th day of September, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

Harvey Hardy, being first duly sworn, *each for himself* says that he resides in Salt Lake City, Utah Territory, and has resided there for 3 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 3 years.

That he is well acquainted with the east thirty acres of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some time prior hereto has been the sum of $7,500.00.

(Signed) HARVEY HARDY.

Subscribed and sworn to before me September 22nd, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } *ss:*

Van H. Brooks, being first duly sworn, *each for himself* says that he resides in Salt Lake City, Utah Territory, and has resided there for two years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for two years.

That he is well acquainted with the east thirty acres of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some time prior hereto has been the sum of $9,000.00.

(Signed) VAN H. BROOKS.

Subscribed and sworn to before me September 26th, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } *ss:*

Ashbel D. Woolley and J. M. Nelson, being first duly sworn, each for himself says that he resides in Salt Lake City, Utah Territory, and has resided there for 4 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 4 years.

That he is well acquainted with the east thirty acres of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some time prior hereto has been the sum of $6,000.00.

That he knows of land in the vicinity of the above-described land, which is not as valuable as the land herein described, having been sold within two months previous to this date for the sum of $190 per acre.

(Signed) ASHBEL D. WOOLLEY.
J. M. NELSON.

Subscribed and sworn to before me this 22nd day of September, 1891.

[SEAL.] GEORGE W. LAMBOURNE,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } *ss:*

E. B. Wicks and J. W. Skinner, being first duly sworn, each for himself says that he resides in Salt Lake City, Utah Territory, and has resided there for 4 years, and his business is that of a real-estate dealer, in which business he has been engaged in said city for 4 years.

That he is well acquainted with the east thirty acres of the south-west quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some time prior hereto has been the sum of $9,000.00.

That he knows of land in the vicinity of the above-described land, which is not as valuable as the land herein described, having been sold within two months previous to this date for the sum of $190 per acre.

(Signed) E. B. WICKS.
J. W. SKINNER.

Subscribed and sworn to before me this 22nd day of September, 1891.

[SEAL.] FRANK T. HIATT,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

In the Supreme Court of Utah Territory.

LEWIS P. KELSEY and JAMES K. GILLESPIE, Appellants,
vs.
W. J. CROWTHER, J. T. LYNCH, and WILLIAM GLASMANN, Respondents.

TERRITORY OF UTAH, *County of Salt Lake,* } ss:

Jesse W. Fox, Jun'r, being first duly sworn, says that he was the assessor of Salt Lake county in the years —.

That he is well acquainted with the east thirty acres of the south half of the southwest quarter of section 3, twp. one south, of range one west, Salt Lake meridian, situate in Salt Lake county, Utah Territory, and with the land in the vicinity thereof, and that he has been on and carefully examined said described parcel of land, and in his opinion the value of said land at this time and for some — prior hereto has been the sum of $9,000.00.

(Signed) JESSE W. FOX, JUN'R.

Subscribed and sworn to before me this 24th day of September, 1891.

[SEAL.] GEORGE M. CANNON,
Notary Public.

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in the supreme court, at Salt Lake City, Utah, Oct. 3rd, 1891. Joseph P. Bache, clerk.

SUPREME COURT OF THE UNITED STATES

No. 304.

OCTOBER TERM, 1894.

LEWIS P. KELSEY AND JAMES K. GILLESPIE,
PLAINTIFFS IN ERROR,

vs.

WILLIAM J. CROWTHER, JOHN T. LYNCH AND
WILLIAM GLASMANN, DEFENDANTS
IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF FOR PLAINTIFFS IN ERROR.

PARLEY L. WILLIAMS,
ORLANDO W. POWERS,
Counsel for Plaintiffs in Error.

Star Printing Co., 70 S. West Temple.

SUPREME COURT OF THE UNITED STATES.

No. 354.

OCTOBER TERM, 1894.

LEWIS P. KELSEY AND JAMES K. GILLESPIE,
PLAINTIFFS IN ERROR,

vs.

WILLIAM J. CROWTHER, JOHN T. LYNCH AND
WILLIAM GLASMANN, DEFENDANTS
IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

STATEMENT.

Plaintiffs in error (plaintiffs below) and William J. Crowther, one of the defendants in error, entered into the following contract, to-wit:

"Salt Lake City, Utah, September 13, 1887.

"Received of Lewis P. Kelsey and James K. Gillespie, the sum of fifty dollars being part consideration of the purchase price, to-wit: twenty-seven hundred and fifty (2750) dollars at which the undersigned agrees and contracts to sell and by good and sufficient warranty deed convey, free of all liens, to said Kelsey and Gillespie the following described lot of ground, to-wit: (Description immaterial here.) Said purchaser to have after this date thirty (30) days for the examination of the title of said premises and in case said title is

> adversely reported on by the attorneys of said purchasers, then said part consideration hereby receipted shall be at once returned to said purchasers, and if said title is approved, I hereby contract and agree to and with said Kelsey and Gillespie that I will at once on the payment of said balance of agreed purchase money, to-wit: twenty-seven hundred (2700) dollars, duly execute, sign and acknowledge and deliver a full and perfect warranty deed conveying to said purchasers the entire title to the said premises, and I agree to at once furnish an abstract of title to said premises and other needful papers.
>
> "WILLIAM J. CROWTHER [Seal]."

Plaintiffs in error were not furnished the abstract mentioned in the above contract, within the thirty days nor at any other time, as the evidence in the record conclusively shows.

[We are unable to make reference to the pages of the record, as it is not yet printed; but the record is very brief.]

Suit was brought by plaintiffs in error to specifically enforce the contract, and the other defendants in error (Lynch and Glasmann) were made defendants because plaintiffs in error alleged that Lynch and Glasmann held some interest in said premises subsequent and subordinate to themselves.

William J. Crowther answered, and Lynch and Glasmann denied that their rights to said premises were subsequent or subordinate to those of the plaintiffs in error. Trial was had and the court found the following facts and conclusions of law, to-wit:

FINDINGS OF FACT.

1.—That the written contract set forth in the complaint was executed by the defendant W. J. Crowther and delivered to the defendants. [It is plain that this finding stating that the contract was delivered to the defendants

is a clerical error as it is conceded all through the record that the contract was delivered to the plaintiffs in error.]

2.—That at no time during the thirty days therein specified did the said plaintiffs tender or offer to pay the said defendants the twenty-seven hundred dollars purchase price of the said land.

That at no time during the said period did the said plaintiffs signify their intention to accept the terms of said contract and to purchase the said land.

3.—That on the 14th day of October, 1887, plaintiffs and defendant Crowther had further conversation on the subject of this purchase; but on that day the plaintiffs or either of them did not tender $2700 or any part thereof or any other sum as per said agreement for the said ground to defendant Crowther and the said plaintiffs were not ready or willing to pay the balance of the said purchase money for the said property to the defendants.

CONCLUSIONS OF LAW.

Wherefore upon the findings aforesaid the court finds that the defendant is entitled to judgment for costs against the plaintiffs.

The decree of the trial court was affirmed by the Supreme Court of Utah Territory and this appeal is from that judgment.

Kelsey et al. vs. Crowther et al., 7 Utah 519, or 27 Pac. Rep. 695.

SPECIFICATIONS OF ERROR.

Now come the said plaintiffs in error and by their counsel assign the following errors as grounds of reversal

of the judgment and decree of the Supreme Court of Utah Territory herein.

d. The said Supreme Court erred in affirming the action of said district court in failing to find whether the appellee Crowther tendered an abstract as specified in said contract to the appellants.

e. The said Supreme Court erred in sustaining the action of said district court in giving judgment for the appellees when it was not found by the said district court whether the said abstract of title had been tendered to the appellants.

h. The said Supreme Court erred in sustaining the action of the said district court in giving judgment for the appellees when the said court did not find that an abstract and deed had been tendered by the appellee Crowther to the appellants.

j. The said Supreme Court erred in affirming the decree of the said district court in favor of the said appellees and against said appellants.

POINT I.

(d) The said Supreme Court erred in affirming the action of said district court in failing to find whether the appellee Crowther tendered an abstract as specified in said contract to the appellants.

(e) The said Supreme Court erred in sustaining the action of said district court in giving judgment for the appellees when it was not found by the said District Court whether the said abstract of title had been tendered to the appellants.

So far as is material on this appeal it is seen from the findings that the court below did not find on any of the

issues except that the plaintiffs in error did not tender the $2700 within the thirty days nor signify an intention during that period to accept the terms of said contract and to purchase said land.

It appears from the contract that an abstract was to be furnished to the plaintiffs in error *at once*; the findings of fact do not find whether or not the abstract was furnished nor do they find any other fact that would excuse not furnishing the abstract.

The trial court should have found on this material fact and issue.

The Second Compiled Laws of Utah, 1888, page 288, provide:

> "SEC. 3379. Upon a trial of a question of fact by the court its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.
>
> "SEC. 3380. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly."

The provisions of the California Code of Civil Procedure are exactly similar to the above.

Deering's Code of Civil Procedure (Vol. 3) Sections 632-4 and notes.

Hayne on New Trial and Appeal, at page 718 (Sec. 239) says:

> "Under the system of express findings on the other hand, nothing is implied, but full findings are required upon every material issue, without any request therefor and without any exceptions on account of defects, and if any material issue is left unfound, it is ground for reversal of the judgment."

Hayne on New Trial and Appeal, Sec. 240, at page 719-20, says:

> "As has been stated the system of express findings requires a finding upon every material issue. This applies not only to issues raised upon allegations of the complaint but also to issues raised upon affirmative defenses in the answer or upon a counter-claim or cross-complaint. And a finding upon every material issue is necessary although no evidence was introduced upon such issue."

The system of express findings prevails under our statute.—Mr. Hayne on New Trial and Appeal, in Section 238, pages 715-16 in speaking of the California Code as to findings, says:

> "The code of civil procedure abolished the system of implied findings and restored the system which prevailed before 1861. It did this by re-enacting in substance the provisions of the Act of 1851. The provisions as re-enacted are as follows:
>
> "'Section 632. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.
>
> "'Section 633. In giving the decision, the facts found and conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.
>
> "The re-enactment of these provisions restored the system of express findings, the construction given by the earlier decisions being adopted. No change has since been made."

It is seen that the above sections from the California Code are exactly the same as the sections quoted from the Utah Statutes.

In Campbell vs. Buckman, 49 Cal. 367, it appeared "that an important question of fact put in issue by the pleadings was as to whether the officers of the Land Department were deceived and misled" by certain false and fraudulent statements.

On page 367, Chief Justice Wallace said:

> "No express finding is made by the court below upon this question of fact and the trial having occurred since the taking effect of the code, no finding can be implied in support of the judgment."

On page 368, Justice Crockett said:

> "But when a fact is directly put in issue, it is the duty of the court to find upon it expressly, one way or the other; and a statement by the judge that no evidence was offered on that point is not the finding of a fact put in issue."

In 55 Cal. 379, Bank of Woodland vs. Treadwell, it appeared that an action was brought to foreclose a mortgage which provided for $100 attorney's fees. The answer alleged that plaintiff's attorney received a certain sum as salary and no more, in full of his services, and the court found:

> "That all the allegations of the complaint are true, and all the allegations and denials of the answer contradicting the complaint in any respect are untrue."

On page 380, Justice Myrick says:

> "This is not a finding upon the issues tendered by the answer as above given; the judgment must therefore be reversed for want of sufficient findings."

In 60 Cal. 436, Soto et al. vs. Irvine, an action of ejectment was brought and issue taken on defendant's allegation as to possession when the action was begun, and the court at page 438 says:

> "There should have been a finding on all the issues. The court should have found whether defendant was possessed of the parcel of land sued for or not. Evidential facts were found by the court and not the ultimate fact of possessed or not possessed. There being no finding on this issue, the decision of the court below is against law."

To the same effect are:

61 Cal. 361, Du Pratt vs. James et al.
57 Cal. 144, Everson vs. Mahew.
57 Cal. 417, Robinson et al. vs. The Pittsburg Ry. Co.
59 Cal. 535, Brown vs. Burbank et al.
67 Cal. 186, Gray vs. Noon et al.

The court below decided this case on the theory that an abstract was not furnished—as the record conclusively shows.

In 7 Utah, 522, Kelsey vs. Crowther, Justice Blackburn says:

> "Nor do we think the failure of the defendant (Crowther) to furnish an abstract extended the time."

William J. Crowther is not entitled to derive any benefit from the new matters pleaded in his answer as they are deemed denied under the Utah code.

2 Compiled Laws of Utah, 1888, page 251, sec. 3248 provides:

> "* * * the statement of any new matter in the answer, in avoidance or constituting a defense or counter claim, must on the trial be deemed controverted by the opposite party."

Consequently such new matter would not be established as true until so found by the court in its findings of fact.

POINT II.

(h) The said Supreme Court erred in sustaining the action of the said district court in giving judgment for the appellees when the said court did not find that an abstract had been tendered by the appellee Crowther to the appellants.

The court below evidently treated a finding on furnish-

ing the abstract as immaterial, on the theory expressed in its opinion; and the material inquiry is whether such finding is material or immaterial. In other words, whether the agreement to furnish an abstract of title is a condition precedent or an independent condition for which an action of damages may be brought for its breach.

The plaintiffs in error have claimed and now claim that though the contract price of $2700 was not paid to William J. Crowther within the thirty days, yet that that fact does not bar a decree of specific performance; because the agreement of William J. Crowther to furnish an abstract of title to the premises was a condition precedent to the performance of any act on the part of the plaintiffs in error.

In I Warvelle on Vendors, page 292, section 3, the author says:

> "* * Where parties make a contract for the sale or exchange of lands which provides for the exhibition of an abstract showing title in the proposing parties by a day named, this is a condition precedent to be performed before either party, in case of an exchange, or the vendor in case of sale, can call upon the other to perform the agreement; and if the abstract is not satisfactory or fails to show the title agreed to be made, the other may elect to consider the contract at an end."

See also pages 290-1-2.

It is clear that the agreement in this case by express agreement makes the duty to furnish an abstract a condition precedent, the contract says:

> "Said purchaser to have after this date thirty (30) days for the examination of the title of said premises and in case said title is adversely reported on by the attorneys for said purchasers then said part consideration hereby receipted shall be at once returned to said purchasers, but if said title is approved, I hereby contract and agree to and with said

> Kelsey & Gillespie that I will at once, on the payment of said balance of agreed purchase money, to-wit: $2700 duly execute, sign and acknowledge and deliver a full and perfect warranty deed conveying to said purchasers the entire title to the said premises, and I agree to at once furnish an abstract of title to the said premises and other needful papers."

Thus the plaintiffs in error were to have thirty days to examine the title and this time could only be had by furnishing an abstract of title *at once*, just as the contract provided. The time to examine the abstract and the furnishing the abstract constituted a condition precedent to be performed by William J. Crowther before plaintiffs in error were required to tender the purchase price. The abstract was to be furnished for the evident purpose of ascertaining from the same whether the title to the premises would or would not be adversely reported upon; if the former, then plaintiffs in error were entitled to the re-payment of the part consideration; if the latter, then they were entitled to such remaining part of the thirty days as would be left after approval of the title to raise the $2700.

Prudent business men would naturally stipulate for as long a time as possible to examine an abstract so as to have a reasonable time left, if title were approved, to raise the purchase money, and it is a very reasonable interpretation that this contract was drawn with just such an object in view.

In 31 Pac. Rep., 504, Taylor vs. Williams, it appeared that plaintiff in error agreed to sell and defendant in error agreed to buy certain real estate, and $500 was paid down and at the same time the following contract was entered into:

> "Trinidad, Colo., March 9, 1889.
>
> "Received of C. M. Williams $500 payment on account of the

sale City Hotel property; balance of $7000 to be paid on or before April 1st, on delivery of warranty deed conveying clear title with abstract.

"D. L. TAYLOR."

The abstract of title was furnished but the solicitor of defendant in error condemned the title as defective and demand was made and suit brought to recover back the $500, expense of examining title and interest on the $7000 while idle. Defendant in error recovered and plaintiff in error sought a reversal. On page 505, Richmond, P. J. says:

"The first thing we have to determine is the character of the contract. If from the language of the entire contract we shall conclude that the intention of the parties was such that the agreement on the part of Williams was to consummate the purchase by paying the balance of the purchase price when he should receive an abstract showing a clear and undoubted title in Taylor, and that it was the duty of Taylor to furnish such abstract, which he failed to do, then the conclusion will be that the furnishing of such abstract was a condition precedent, and it is the duty of both courts of law and of equity to enforce the same. It is a well known fact that few persons purchase real estate at the present time without first obtaining from the vendor an abstract of the records the condition of the vendor's title and with the view of having such title passed upon by some one learned in the law. We have no doubt but that the parties to this transaction at the time of the execution of the writing and the payment of the five hundred dollars well understood that the abstract should precede the execution and delivery of the warranty deed and that it should receive the consideration of such solicitors as the vendees might select. * * * The contract was to furnish an abstract of title and such abstract should contain whatever concerns the sources of the title and its conditions, not only should the descent and line of the title be clearly traced out and all encumbrances, all chances of eviction or adverse claims should be shown, but material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which touch the title and also liens and encumbrances of every nature should be set forth, and in

> every contract for the sale of real estate it is implied that the seller will before the completion of the contract show a good marketable title. The object of the abstract is to enable the purchaser or his counsel to pass more readily on the sufficiency of the title."

The contract in the above case to furnish an abstract was held a condition precedent though there was nothing in the same to lead to that result except what would naturally be the construction by stipulating for an abstract of title; in the case at bar the language of the contract *intrinsically* demands that the condition be construed to be precedent in order to carry out the expressed intention of the parties, to-wit:

> "Said purchaser to have after this date thirty (30) days for the examination of the title of said premises and in case said title is adversely reported on by the attorneys of said purchasers, then said part consideration hereby receipted shall be at once returned to said purchasers. * * *

In 105 Ill. 501, Howe vs Hutchinson, the parties made a contract for the exchange of lands, each to furnish an abstract of title by a day named, to the other; and on page 504, Chief Justice Scott says:

> "It will be observed that by the terms of the agreement both parties were to exhibit abstracts of title showing good title to their respective lands. This was a condition precedent before either party could call on the other to comply with the agreement."

In 5 Exchequer 696, The Thames Haven Dock & Rwy. Co. vs. Brymer et al., the vendor of the Dock Company agreed to sell certain premises "deduce a good title to the premises (not saying when)," and on or before a certain date, on payment by the Dock Company of certain money, to execute a proper conveyance. The conveyance was to be prepared by the Dock Company and to be executed by Brymer.

One of the questions in the case was whether the deducing a title was a condition precedent. On page 710, Justice Patteson says:

> " * * but the company contend that they could not prepare a conveyance until a good title had been deduced by Bromley according to his covenant; therefore that such deduction of title was necessarily a condition precedent. We are of the opinion that they are right in so contending. The recitals to be introduced into the conveyance and even the names of the persons who were to be parties to it could not be known to the company with any certainty until the title had been deduced."

In 23 Pac. Rep. 180, Kane vs. Rippy et al., the question was not whether it was a condition precedent to furnish an abstract, yet the discussion of the court is in point. On page 181, Justice Lord says:

> "The object of the abstract is plain; it is to enable the purchaser or his counsel to pass readily on the validity of the title, as it should contain whatever concerns its source and condition. Mr. Curwen says:
>
> 'The object of the abstract is to furnish the buyer and his counsel with a statement of every fact, and abstract of the contents of every deed on record upon which the validity and marketableness of the title depend, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each conveyance as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence shall be required. The buyer has a right to demand a marketable title. He has a right to demand that the abstract of title shall disclose such evidence of that title as will enable him to defeat any action to recover or encumber the land. Curw. Abs. Sec. 36.'
>
> "* * * In the case at bar the contract is written and the defendants agree to convey a good title free from all encumbrances whatsoever and to furnish an abstract of such title. What was the object of this abstract? Plainly to

> enable the plaintiff and his counsel to determine readily on the sufficiency of the title agreed to be conveyed by the contract; in a word, an abstract which would disclose such evidence of title as would show the title free from all encumbrances whatsoever and defeat any action to recover the land."

This case in the Supreme Court of Utah (Kelsey et al. v. Crowther et al., 7 Utah, 519) was decided on the theory that the agreement to furnish an abstract was an independent condition, and its breach could be adequately compensated in damages.

On page 521-2 Justice Blackburn says:

> "The contract is an option. The plaintiffs had thirty days in which to tender the money and demand a deed. By the the terms of the contract they did not have thirty-one days and having failed in that time to tender the money they lost their right to enforce the contract. Nor do we think the failure of the defendant to furnish an abstract extended the time. It might make him liable for damages but not enlarge or change the terms of the contract."

First:—In other words the court decides in effect that plaintiffs in error by their contract purchased thirty days' time and nothing more.

It is elementary that a contract should be construed to effectuate the intention of the parties, such intention being gleaned from the language used and the subject matter. By the contract in question, William J. Crowther agreed "to at once furnish an abstract of title to the said premises and other needful papers," and also agreed that Kelsey and Gillespie were to have *thirty days* after the date of the contract to examine the title. The intention then is manifest that the abstract should be furnished *at once*, or thirty days could not be had to examine the title; when the abstract is furnished it may be necessary then to de-

mand the "other needful papers" mentioned in the contract, and it would be necessary then to furnish them; thus plaintiffs in error purchased more than thirty days time; they purchased the right to have an abstract at once and other needful papers, the right to have thirty days' to examine the title, and also the right if the title was approved to have the remaining part of the thirty days to obtain the money to complete the purchase.

In 33 Fed. Rep., 536, Johnston vs. Trippe, Justice Newman in speaking of an optional contract quite similar to the one in the case at bar (except as to the abstract) said:

> "* * Here for a reasonable consideration, the sum of fifty dollars, the defendant agrees that the complainant shall have the privilege of buying his land within a year; that is, the defendant sells to him for fifty dollars the privilege of purchasing the land within a year."

So in the case at bar—for fifty dollars Kelsey and Gillespie purchased thirty days' time, the right to have an abstract at once, other needful papers, and thirty days' time to examine the abstract, or else they purchased nothing. The parts of the contract are not severable, one thing is purchased as much as another; they are all purchased or none of them are.

A construction of this or any contract should not be favored or sought, which allows the vendor not only to commit a breach of its terms to the detriment of the vendees, but to also successfully contend that the vendees have lost their rights, especially when such additional time becomes necessary because of the breach of the vendor. Such construction allows one to take advantage of his own wrong and reap substantial benefit from his own breach. The principle involved is the same as though the purchase price were one hundred thousand dollars and the part payment attempted to be forfeited were fifty thousand dollars.

Second.—The Supreme Court of Utah also holds by its opinion that the breach committed in not furnishing an abstract may be adequately compensated in damages.

Such a construction again does violence to the intention of the parties by forfeiting the part payment however large or valuable and giving compensation to the extent of the value of the abstract,—at most only a few dollars.

The law on the precedency of conditions is against such construction:

In 1 Peters 464-5, Bank of Columbia vs. Hagner, Justice Thompson said:

> "In contracts of this description [sale of real estate] the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice and a purchaser might have payment of the consideration money enforced upon him and yet be disabled from procuring the property for which he paid it.
>
> "Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident the inclination of courts has strongly favored the latter construction as being obviously the most just."

In 4 Wash. C. C. 714, Goodwin vs. Lynn et al., the contract was to be completed April 1st, but previous to that certain land was to be plowed and sown. Justice Washington charged:

> "In the construction of an instrument for the purpose of understanding whether the covenants are dependent or not, the intention of the parties is to be discovered rather from the order of time in which the acts are to be done than from the structure of the instrument or the arrangement of the covenants."

In 1 Wharton on Contracts, Sec. 554, the doctrine laid down by Lord Mansfield is approved, to-wit:

> "* * * that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance."

In 1 Sugden on Vendors, page 362 [239] (13th Eng. Ed.) the author says:

> "Before quitting this subject it must be remarked that in agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent where a contrary intention does not appear. The true rule is that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties."

Consideration of the subject matter leads to the same conclusion, as no careful person agreeing for an abstract would purchase without taking the precaution to examine the same; consequently no one should be compelled to purchase or forfeit the part payment without the production of the abstract to examine the title.

The construction given by the Supreme Court of Utah to the contract is absolutely destructive of its good sense, its express language and its evident purpose; and results in inequitable benefits to the defaulting party and casts undeserved burdens on the ones lulled into waiting.

POINT III.

The contract in question is enforceable though it were unilateral, an option, or intended to be binding on one party only.

[It is assumed under this head that counsel for defendants in error will contend as in the court below that the

contract in question is not enforceable for want of mutuality.]

Defendants in error contended in the court below that the contract in question was not mutual and therefore could not be enforced. The following cases were cited by defendants in error to support this proposition:

10 Wall. 359, Marble Co. vs. Ripley.
21 Cal. 406, Cooper vs. Pena.
3 Pome. Eq. Jur. Sec. 1405.
8 Fed. Rep. 697, Smith vs. Reynolds.
Har. Ch. 124, McMurtrie vs. Benner.
63 Pa. St. 335.
41 Mich. 248, Maynard vs. Brown.
2 A. K. Marsh 345, Butcher vs. Van Buskirk.

The case in 10 Wall. 359, Marble Co. vs. Ripley, shows that while performance was refused for want of mutuality, yet that the absence of mutuality existed in the fact that Ripley might "relinquish the business and abandon the contract at any time on giving one year's notice,"—a case very different from the one at bar.

The case in 21 Cal. 406, Cooper vs. Pena, was a suit to specifically enforce a contract for *personal services*,—obviously not in point.

3 Pome. Eq. Jur. Sec. 1405, lays down the general doctrine as to mutuality and then in note 1, page 448, same section, lays down the exceptions which include the case at bar.

In 8 Fed. Rep. 696, Smith vs. Reynolds, there was no consideration for the contract, and specific performance was denied on that ground.

It is expressly stated in the case on page 697 by Hallett D. J.:

> "* * Of course if the seller when it is still within his power to sell accepts the money or some part of it, he is bound to make the conveyance. * *"

The most casual inspection of the other of the above cases will show them not to be in point so far as regards the contract in question.

The cases are uniform that contracts like the one at bar are enforceable, that the vendee need not sign the contract to be bound as he is not the party to be charged under the statute of frauds, that the filing of a bill for specific performance makes the remedy mutual, and that the doctrine of mutuality does not apply in cases where the contract is intended to be unilateral.

In 33 Fed. Rep. 530, Johnston vs. Trippe, the bill was for specific performance of an optional contract for the sale of realty, signed by the vendor alone. Demurrer was interposed. Justice Newman exhaustively reviewed the authorities on the mutuality and enforceableness of the contract and arrived at the conclusion that the contract was enforceable. On page 536, Justice Newman says:

> "I think it is settled by the above authorities and others that might be cited that where the owner of land gives another for a sufficient consideration an option or privilege to purchase the land within a given time, in writing, with full knowledge of the fact that he is bound and the other party is not, it is such a contract as will be enforced in equity at the instance of the party holding the option. Does such a contract indeed lack mutuality? The seller for fair consideration agrees to give the proposed purchaser a certain fixed time in which to make the contract mutual by acceptance of the offer to sell. If he accepts within the specified time, both parties are fully bound."

Justice Newman again says, page 536:

> "I am clear therefore that this case does not come within the

> class where lack of mutuality will prevent enforcement of the contract, and that it does come within a well recognized exception to that rule, of optional sales upon fair consideration."

43 Cal. 458, Vassault vs. Edwards, is a case on all fours with the one at bar so far as the mutuality and the enforceableness of the contract are concerned.

30 Am. St. Rep. 47 (93 Ala. 153) Ross vs Parks.

23 N. J. Eq. 32, Green vs. Richards, in which it is stated on page 35 that the doctrine of mutuality does not apply "to cases where the contract, by its terms, gives to one party a right to the performance which it does not give to the other."

To the same effect are:

1 C. E. Green 259, Van Doren vs. Robinson et al.
24 Am. St. Rep. 17 (10 Mont. 5) Ide vs. Leiser.
44 N. J. Eq. 349, Woodruff vs. Woodruff.
1 Story Eq. Jur. Sec. 736 a, note 3.
3 Pome. Eq. Jur. Sec. 1405, note 1.
33 Am. Dec. 635 (16 Me. 92), Rogers vs. Saunders.
67 Am. Dec. 500 (4 R. I. 14), Ives vs. Hazzard.
48 Am. Dec. 485 (49 Pa. St. 88) Corson vs. Mulvany.

The cases cited by defendants in error to the point that time is of the essence of the contract, do not militate against the position or the cases cited by plaintiffs in error, as none of those cases involve a construction or interpretation of a contract calling for an abstract of title; and therefore the courts were not called upon to decide, and did not decide, the effect of the vendee not performing within the time, when the vendor had agreed, *but failed* to furnish an abstract of title; nor do any of such cases de-

cide whether the agreement to furnish such abstract was or was not a condition precedent.

POINT IV.

(j) **The said Supreme Court erred in affirming the decree of the said district court in favor of the said appellees and against said appellants.**

The judgment of the Supreme Court of Utah Territory affirming the judgment of the district court in favor of the defendants in error, and the order denying motion for new trial should be reversed with costs and a new trial ordered.

PARLEY L. WILLIAMS,
ORLANDO W. POWERS,
Counsel for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

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IN THE SUPREME COURT OF THE UNITED STATES.

LEWIS P. KELSEY AND J. K. GILLESPIE, APPELLANTS,

vs.

WILLIAM J. CROWTHER, J. T. LYNCH AND WILLIAM GLASMANN, RESPONDENTS.

BRIEF FOR RESPONDENTS.

ARTHUR BROWN,
Attorney for Respondents.

Star Printing Co., Salt Lake.

IN THE SUPREME COURT OF THE UNITED STATES.

LEWIS P. KELSEY AND J. K. GILLESPIE, APPELLANTS,

vs.

WILLIAM J. CROWTHER, J. T. LYNCH AND WILLIAM GLASMANN, RESPONDENTS.

STATEMENT OF THE CASE.

On the 13th day of September, the defendant Crowther executed the agreement set forth in the abstract, the effect of which is that he offers to sell to the plaintiffs certain land therein described, for the sum of $2750 and that the said plaintiffs are to have thirty days in which to accept said offer, for which time to accept the offer they paid $50. No agreement to purchase was mentioned or spoken of in the contract.

During the thirty days, the plaintiffs did not accept the offer; but on the 31st day Mr. Crowther went to their office. In that interview the plaintiffs sought to make a new bargain on other and different terms with Crowther; but, as he declined to make any bargain, Kelsey, one of the plaintiffs, claimed that he had the right at that time to perform the old one, and, after Crowther had left, went to the door, with a couple of bags in his hand, said to contain money, and waived them at him, saying, "Here's your money."

Lynch & Glasmann claim to be *bona fide* purchasers. The court found that there was not sufficient performance on the part of the plaintiffs to a specific performance, and dismissed the bill.

BRIEF

I.

. The first specification of error mentioned in the brief of appellants is founded on a clerical mistake.

The court finds that the contract was delivered to the defendants. Evidently, the word defendants was a mistake for the word plaintiffs, in writing up the findings; and this court, should it deem it material, would undoubtedly have the power to change the word to plaintiffs. But the finding is wholly irrelevant, for exactly the reasons mentioned in the plaintiffs' brief.

The delivery to the plaintiffs of that written document was not denied. It was admitted by the pleadings, and needed no finding, one way or the other. There is no finding contrary to that admission. The finding is, that it was delivered to the defendants. A mutual contract is of course delivered in the theory of law to both parties to it to make it effectual. It is in theory of law delivered by the plaintiffs to the defendant, and by the defendant to the plaintiffs. The finding that it was delivered to the defendants, is not a finding that it was not delivered to the plaintiffs. The whole assignment of error and argument seems to be upon a vague, slight, imaginary technicality. Yet it is the most effectual of all the assignments on which the plaintiffs rely.

II.

To understand the effect of point number two, dis-

cussed in plaintiffs' brief, we must refer again to the written contract between the parties. I quote it again:

> "Salt Lake City, Utah, September 13, 1887.
>
> "Received of Lewis P. Kelsey and J. K. Gillespie, the sum of fifty dollars, being part consideration of the purchase price, to-wit: $2750, at which the undersigned agrees and contracts to sell, and by good and sufficient warranty deed convey, free of all liens, to said Kelsey & Gillespie, the following described lot of ground, to-wit: (omitting the description). Said purchaser to have after this date thirty (30) days for the examination of the title of said premises, and in case said title is adversely reported on by the attorneys of said purchasers, then said part consideration, hereby receipted, shall be at once returned to said purchasers, but, if said title is approved, I hereby contract and agree to, and with said Kelsey & Gillespie that I will at once, on payment of said balance of agreed purchase money, to-wit: $2700, duly execute, sign and acknowledge and deliver a full and perfect Warranty Deed, conveying to said purchasers the entitle title to the said premises, and I agree to at once furnish an Abstract of Title to the said premises, and other needful papers.
>
> W. J. CROWTHER, [Seal.]"

It will be observed that nowhere does the purchaser become liable for the $2,700, either absolutely or in any contingency. Nowhere does the purchasers say that they will take the land. But they are to have thirty days, at the expiration of which time they could forfeit the $50, and that would be the extent of their liability; or, at their option, they could pay $2,700 and procure the land. As a contract to purchase lands, which counsel assumes it to be, it lacked the element of mutuality. I do not base this objection on the ground that it is signed merely by one person, but on the ground that by its terms, it is binding

on merely one side. As such it could not be enforced as a contract to purchase land.

I refer to the following authorities:

Marble Co. vs. Ripley, 10 Wall. 359.
Cooper vs. Pena, 21 Cal. 406.
2 Pom. Eq.. 1405.
Smith vs. Reynolds, 8 Fed. Rep. 697.
McMurtie vs. Benner, Har. Ch. 124.
63 Penn. St. 335.
Maynard vs. Brown, 41 Mich. 248.
Butcher & Van Buskirk, 2 A. K. Marsh, 345.

But in truth this was not a contract to convey land at all. It was a contract whereby they mutually agreed, for a consideraiton, that the plaintiffs should have a certain number of days in which to accept and offer. It was TIME that was bought and paid for—*time to accept.* Ordinarily, when an offer is made, it imports immediate acceptance. But here the offer is to be held open and kept good, and Crowther was not at liberty to back out of it for thirty days. But thirty day was all the time that he was entitled to have; and, having bought thirty days, the plaintiffs had no more right to insist on thirty-one days, than they would have to say that having bought thirty horses they would have the right to thirty-one.

During the thirty days thus purchased, the plaintiffs never in any manner indicated their willingness or wish or desire to purchase or accept. They made no tender; they did no act. So that performance on their part within the time allotted was not attempted, and the second finding is literally true; and the second finding being true is a

complete answer to plaintiffs' right to recover in this or ony other court.

The true nature of this contract is illustrated in the case of Hill vs. Center, 40 Cal. 63. That was an agreement of leasing, and in it was contained a clause that at any time during the lifetime of the lease, in consideration of the lease, the lessee should have the privilege of purchasing at a price therein named. It will be seen that that was an offer in which the seller had agreed to keep open during the lifetime of the lease. But in none of these cases is the vendor required to keep it open after the time specified.

Time is the essence of the contract, and the party is not entitled to an extra minute.

Settle vs. Winters, 10 Pac. Rep. 221, and cases there cited.
Gray vs. Stubbs, 43 Cal. 362.
Wells vs. Smith, 7 Page 22.
Phillips vs. Ill. Cen. R. Co., 63 Ill. 468.
Goldsmith vs. Gild, 92 Mass. 239.
Christie's Appeal 85 Penn. St. 465.

The rule is exactly the reverse of that where a land contract is made, and the vendee takes possesion. There he becomes the equitable owner; and if he has made part payments and improvements, time cannot be of the essence of the contract. But where the contract is strictly executory, then equity is not more authorized to give the party any further time than he is entitled to give him more of anything else. Equity cannot make contracts for the parties. It must enforce those that the parties have made.

It is said, however, in the brief of plaintiffs, that the abstract was not furnished, and that therefore they were

entitled to an extension. That would be an attempt again to make a new contract for the parties. The plaintiffs claim that the defendant was to furnish an abstract at the date of the agreement. If that were true and the defendant failed to furnish it, the measure of damage would be that the plaintiffs should furnish it themselves and charge the price of it to the defendant. The abstract is a chattel easily procured, and the measure of damages for not furnishing the chattel agreed upon is the cost of buying it. The consequence which plaintiffs contend for, that if we never furnished the abstract, the contract would always remain in force would be to make a new agreement, is absurd upon its face; but the contract does not provide that the abstract was to be furnished at the date of the agreement. but is part of the clause in which the defendant is to execute a deed. "On payment" he is to execute a deed and furnish an abstract. Not till then was there any abstract due.

But it is contended in plaintiffs' brief further, that Crowther must tender to the appellants a deed, and they quote some authorities to that effect.

This was a contract in which the party who sought to demand performance must take the iniative step. Each step is dependent upon the other side taking one. If Kelsey & Gillespie wanted performance of this contract, they must tender a deed, and the language of the contract is emphatic upon that point. "*On the payment of said balance*" means that after he has got his pay, defendant is to make the deed, and not until then. The same authorities quoted by plaintiffs establish this doctrine also.

Gray vs. Dougherty, 25 Cal., 279.

The second finding is also authorized by the testimony of Mr. Kelsey himself. He not only did not perform dur-

ing the thirty days, but on the 31st day he did not intend to perform. It is true he went through the forms of hollooing, "Here 's your money," but in consequence of what had proceeded, and the attempt to make a new bargain at that time, Crowther was justified in believing that the plaintiffs were not in good faith, and that they did not intend to pay him $270. Kelsey did not have $2700 counted out; and he testifies himself in his rebutting testimony, slightly referred to in the abstract, and more fully in the testimony, that he was not willing to take a deed from Mr. Crowther without his wife's signature, and that when he offered the $2700, it was on condition that his wife would sign it, so as to give him a deed free from any encumbrance. The wife was not required to sign it.

Burk's Appeal, 75 Penn. St. 141.
Burk's Appeal, 80 Penn. St. 413.

Neither did the plaintiff have any right to deduct any part of the $2,700 from the purchase money if the wife did not sign it. All the defendant was required to do was to furnish a good and sufficient warranty deed. There could be no breach of that warranty deed until there had been an ouster or a failure to deliver. The inchoate right of dower is not an incumbrance. It could not be an ouster of any part of the premises until after the death of William Crowther. It might never be anything; and when the plaintiffs say they were not willing or ready to pay the $2,700 unless other conditions were added than those required by the contract, they say they were not ready and willing to perform the contract at all. This discussion disposes of the third finding of fact.

The evidence in the case shows that the decree was right. The plaintiffs had not performed the contract.

The particular assignments therefore became immaterial. Maxfield vs. West, 23 Pac. Rep 754-5.

III.

The unwritten agreement could not be the basis of enforcing the contract. It is often proper and right to bring in parol evidence to resist the specific performance of a written contract, but parol evidence cannot be made to add to it. The proposed addition also was wholly immaterial.

IV.

Counsel for the appellants make the point that there was a failure to find as to the detail of a tender of title. The tender was immaterial in view of the circumstances; an abstract need only be furnished in case Crowther desired to enforce the contract himself, if he could have enforced it; as there was nothing he could enforce even in that event it was immaterial. This court will not review mere questions of practice. The point involved in this case as to findings were urged at great length with all the authorities now cited in the case of Fox vs. Haarstick, 156 U. S. 674, an appeal from the same court under the same circumstances. I call attention to the argument of the court in that case and to the brief filed in behalf of the respondents in that case and to the same authorities there cited.

To support our contention that the findings in this case fully cover and correspond with the issue, we refer to the following cases:

Malone vs. County of Del Norte, 77 Cal. 217.
Kisling vs. Shaw, 33 Cal. 425.
Breeze vs. Doyle, 19 Cal. 102.
McCourtney vs. Fortune, 57 Cal. 619.
Roberts vs. Hailey, 65 Cal. 402.

Knowles vs. Seale, 64 Cal. 377.
Diffendorf vs. Hopkins, 95 Cal. 346.
Brison vs. Brison, 90 Cal. 346.
Fontaine vs. S. P. R. R. Co. 54 Cal. 645-654.
Hawes vs. Clarke, 84 Cal. 275.
Heinlen vs. F. C. & I. Co., 68 Cal. 36.

These questions of practice are local in their nature. Whether a finding is sufficient or insufficient depends upon the construction of the local statute. The practice having been taken from California, the construction of the California statute is peculiarly applicable.

It is not a question of general common law or commercial law or a Federal question or anything else that this court will review. It falls within the reasoning of the rule laid down in the case of Buena Vista County vs. I. F. & S. C. R. R. Co., 112 U. S. 176, in which the court says:

> "Other errors are assigned upon the record, relating, however, to matters of pleading and practice under the laws of the state, which, as they involve no Federal question, are not proper for our consideration."

It is true that was a writ of error to the State Court. This is an appeal from a Territorial Court. The limit of jurisdiction would not be the same, but the limit of construction and discretion would probably amount to the same thing. As we have shown from the discussion of the second point, to determine whether a finding is necessary or not the court must go into the evidence, it must weigh and consider the evidence. The California authorities settle the point beyond controversy that if there is no evidence offered on the subject of fraud no finding is necessary on that subject whatever the allegation may be. How will this court determine whether evidence was offered on that subject unless it weighs the evidence in the

cause the same as a jury would. Nothing is better settled by the decisions of this court, than that it will not review or question the truth of the findings of fact made by the court below; it will determine whether a finding is well or ill taken, whether from a Territorial or any other court. This court has adhered to this rule in considering appeals from Utah as well as from all the rest of the country. The necessity of a finding of fact upon this affirmative issue can only be determined by examining the facts and ascertain what they show. Counsel's argument itself is an argument on facts and he asks you to entertain it as a jury would entertain an argument or fact, to consider its weight and bearing and its surroundings for the sake of lending color to his point, which is merely technical and does not reach the merits of the case.

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